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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 518

THE ATLANTIC REFINING COMPANY
CITIES SERVICE PRODUCTION COMPANY
CONTINENTAL OIL COMPANY
TIDEWATER OIL COMPANY, *Petitioners*

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK
LONG ISLAND LIGHTING COMPANY
PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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of this consideration, the Commission found that the matter of price at which the sales were to be made initially was outweighed by the desirability of attachment of the reserves to Tennessee's system (*infra*, p. 15a). In a further explanation of the exercise of its discretionary power, the Commission noted the existence of Section 5(a) rate investigations against three of the four Petitioners and concurrently instituted an investigation into the rates of the fourth, stating (*infra*, p. 16a):

> "By this means relief can be afforded to the consuming public if it should be found that the 21.4-cent initial rate to be charged for the off-shore gas is excessive."

Review was sought by the Public Service Commission of the State of New York, Long Island Lighting Company, and Public Service Electric and Gas Company. In their petitions for review, as in their applications for rehearing, they urged that the Commission erroneously exercised its discretion in refusing to attach rate reducing conditions to the certificates granted to Petitioners. The Court below summarized these contentions as follows (*infra*, p. 6a):

> "The petitioners pose substantially similar questions on the merits of the case, namely, whether the Commission committed error in its order of June 24 in dispensing with the consideration of the element of price because of the threat of the producers to withhold the gas from interstate commerce, after two previous determinations by the Commission that the sale should not be certificated without evidence in the record that the initial rate was just and reasonable."

But the Court below deliberately did not decide this question. Instead, it framed a different objection of

cate proceedings into rate cases whenever a question is raised as to initial price. Here, the opposite conclusion would be indirectly achieved by insinuating the view of the Court of Appeals for the Third Circuit that "the Commission probably should always consider the impact of the initial rate" at the time of certification (*infra*, p. 7a). This view of the Third Circuit "indicates the desirability of a ruling by this Court," as the Government succinctly put it in acquiescing in the granting of *certiorari* in *Oklahoma Natural*.[6]

Grave federal questions are raised by the decision below as to the scope of the statutory jurisdiction of the Federal Power Commission in its administration of the certificate provisions of the Natural Gas Act, and as to the statutory jurisdiction of a court of appeals in reviewing commission determinations thereunder.

The Court below held that a refusal by an applicant to accept a certificate containing a commission-imposed condition reducing the contract price deprives the Commission of its statutory jurisdiction to consider the application further on rehearing. In other words, it held that the Commission could not change its mind on rehearing and grant a certificate without such condition. Moreover, in total disregard of express Commission findings that it had weighed both price and demand considerations and concluded that "the price consideration should not be made the prime determinant of what the public convenience and necessity require," (*infra*, p. 15a) the Court below remanded the proceedings to the Commission with directions to proceed in conformity with the Court's view that the matter of the initial rate was here a "necessary considera-

[6] Memorandum for the Federal Power Commission, p. 2.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Come now The Atlantic Refining Company, Cities Service Production Company, Continental Oil Company and Tidewater Oil Company (Petitioners), intervenors in the proceedings below, and pray that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in such proceedings on June 30, 1958.

OPINIONS BELOW

The Opinion of the Court of Appeals, entered June 30, 1958, is reported at 257 F. 2d 717. The Opinion and the Court's judgment entered the same day are reprinted herein as Appendix A (*infra*, pp. 1a-11a). The order of the Federal Power Commission, issued June 24, 1957, which was reversed by the Court below, is reported at 17 F.P.C. 880. For the convenience of the Court, it is reprinted herein as Appendix B (*infra*, pp. 12a-26a).

JURISDICTION

The Opinion and Order of the Court of Appeals for the Third Circuit were entered on June 30, 1958. Petitions for rehearing were denied on August 27, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1948) and Section 19(b) of the Natural Gas Act, 52 Stat. 831 (1938); 15 U.S.C. § 717r(b).

QUESTIONS PRESENTED

1. Must the Commission convert a certificate proceeding, under Section 7 of the Natural Gas Act, into a rate case when a question is raised as to the initial price?

2. In a certificate proceeding, can an applicant's refusal to accept a certificate conditioned to require a reduction in the contract sale price deprive the Commission of its statutory jurisdiction to consider the application further on rehearing?

3. Can a court of appeals vacate a certificate order because of its view that the Commission failed to recognize the initial rate as a necessary consideration in determining the public convenience and ne-

cessity, when such view is contrary to explicit findings delineating the Commission's consideration of the initial rate in relation to demand for gas and the Commission's conclusion that "the price consideration should not be the prime determinant"?

4. Where the statute conferring review jurisdiction on a court of appeals forbids it to consider any objection to an order not theretofore urged before the Commission in an application for rehearing, can the court vacate a commission order because of the court's view that the Commission lacked statutory jurisdiction to consider the application before it, an objection raised *sua sponte* by the court and not urged at any time by any party?

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821 (1938), as amended by 56 Stat. 83 (1942), 15 U.S.C. §§ 717-717w, are set forth in Appendix C hereto (*infra,* pp. 27a-33a).

STATEMENT OF THE CASE

The commission order under review, issued on June 24, 1957, granted certificates of public convenience and necessity to each of the Petitioners, authorizing each to sell natural gas to Tennessee Gas Transmission Company (Tennessee) in accordance with the terms of their respective applications (*infra,* p. 17a). The applications, in turn, were based upon separate contracts between each of the Petitioners and Tennessee.[1]

Factual Background.—Each Petitioner owns an undivided 25 per cent interest in leases covering 95,000

[1] Notwithstanding the separate status of each Petitioner, considerations of convenience lead to their joint presentation of this petition.

acres located in the Gulf of Mexico, 15 to 30 miles offshore Cameron and Vermilion Parishes, Louisiana (J.A. 23a-24a, 280a). Each sold its share of gas pursuant to separate contracts with the same purchaser, Tennessee (J.A. 21a, 286a). One of the Petitioners, Continental Oil Company, was designated as operator of the leases (J.A. 23a). Deliveries are made to Tennessee at platforms in the Gulf of Mexico (J.A. 25a). Tennessee transports the gas so received to a point of interconnection with its main transmission line near Kinder, Louisiana, for further transmission through its interstate system (J.A. 46a).

Under their contracts, Petitioners agreed to dedicate a total of two trillion cubic feet of natural gas to be produced from their offshore leases. At the time of the hearing, reserves amounting to 1.673 trillion cubic feet of gas had been proven on only 11 per cent of the dedicated acreage (J.A. 33a-38a, 122a, 282a, 285a). Taken together, the contracts provide for the enormous delivery to Tennessee of approximately 240 million cubic feet of natural gas per day for 20 years.

The initial price under the contracts is 21.4¢ per Mcf.[2]

Proceedings Below.—Hearings were held upon Petitioners' applications, participated in by the Public Service Commission of the State of New York, Long Island Lighting Company, and Public Service Electric and Gas Company. They did not question the showing that Petitioners were "able and willing" to perform the service proposed. They questioned only whether the proposed sales were required by the public

[2] The price of 21.4¢ per Mcf is exclusive of Louisiana gas gathering tax reimbursement. Throughout this Petition, all prices referred to are exclusive of such tax reimbursement.

convenience and necessity unless conditions were attached to the requested certificates reducing the initial price fixed by the contracts. They presented no witnesses and no evidence in support of their contention (J.A. 264a-265a).

Thereafter, the Presiding Examiner who received the evidence issued his initial decision which granted certificates to the Petitioners in accordance with their applications. Upon exceptions, the Commission issued on April 22, 1957, the first of three successive orders in these proceedings. After adopting findings of the Presiding Examiner that there is a need for the gas on the Tennessee system and that the Petitioners are ready and able to deliver—findings which the Commission held "argue conclusively that the sale is necessary in the public interest"—the Commission issued temporary authority to the Petitioners to make the sale (J. Pet. for Rev. No. 12,403, Ex. E, p. 59). The Commission also remanded the proceedings to the Presiding Examiner to determine "at what rate the public convenience and necessity requires the sale of natural gas by CATCO[3] to Tennessee Gas to be made" (*id.*, p. 62; footnote added). The Commission cautioned, however, that its action did not imply that the contract rates were not in the public interest (*id.*, p. 59).

The Petitioners filed an application for rehearing of the April 22 order, noting that because of the unsettled state of the law and applicable precedents to be used in producer rate determinations, acceptance of such certificates and procedure would constitute an undue busi-

[3] This abbreviated reference to Petitioners is derived from the initial letters in their names, Cities Service Production Company, The Atlantic Refining Company, Tidewater Oil Company, and Continental Oil Company.

ness risk which Petitioners could not accept (J.A. 399a). Subsequently on May 20, 1957, the Commission issued the second of its three orders. By this order, the Commission modified its earlier order, withdrawing the grant of temporary authorizations to the Petitioners and substituting "permanent" certificates (J. Pet. for Rev., No. 12403, Ex. F, pp. 64-71). To these, the Commission attached a condition requiring Petitioners to amend their contracts with Tennessee to reduce the initial rate from 21.4¢ per Mcf to 17¢ per Mcf. This second order was further conditioned to require contract amendments enabling the Petitioners to file for an increase to 21.4¢ per Mcf, effective one day after commencement of deliveries. The Commission also indicated that such increase would be suspended for a period of 24 hours before being allowed to become effective subject to refund.

Petitioners notified Tennessee that they could not accept certificates so conditioned (J.A. 418a).[4] Tennessee then filed an application for rehearing and requested oral argument which was subsequently held before the Commission sitting *en banc* (J.A. 416a-423a, 424a-427a). Thereafter, the Commission issued its order of June 24, 1957, which is the only order here under review, granting certificates to Petitioners without any rate reducing conditions (*infra*, pp. 12a-26a). After reviewing the procedural history, the Commission set forth the reasons which impelled it to grant the certificates without rate reducing conditions, making it clear that it considered the primary basis for its decision to be the great need for the gas supplies on behalf of the public served by the Tennessee system. Because

[4] This act was characterized by the Court below as a "threat" to the Commission (*infra*, p. 5a).

its own to the Commission's order, not urged before the Commission for its primary consideration and not advanced in argument or brief before the Court. This new issue, and the only one decided by the Court below, concerned an entirely novel question of the Commission's "statutory jurisdiction." The Court said (*infra*, p. 6a):

> "We conceive of the question, however, as a more fundamental one, involving the *statutory* jurisdiction of the Federal Power Commission. It is whether the Commission has authority to consider an application for a certificate under Section 7(e) where the terms of the application limit the scope of the inquiry which the Commission is required to make for a determination of public convenience and necessity" (italics supplied).

Then, declining to reach the question presented by the petitions for review as to whether the Commission abused its discretion in refusing to attach a rate condition (*infra*, p. 7a), the Court concluded that Petitioners' refusal to accept conditional certificates deprived the Commission of its "statutory jurisdiction" to consider the price element of the certificate applications. On this objection, raised *sua sponte*, the Court reversed the Commission's June 24 order.

REASONS FOR GRANTING THE WRIT

This case presents the other half of the central question involved in *Oklahoma Natural Gas Company* v. *Federal Power Commission*, where this Court granted *certiorari* on November 10, 1958.[5] There, the Court of Appeals for the District of Columbia Circuit had sustained a commission refusal to convert certifi-

[5] No. 288, October Term, 1958.

tion in the scope of inquiry into the determination of public convenience and necessity" and that the Commission had left no doubt of the "importance and necessity of a consideration of the *reasonableness* of the proposed initial rate" (*infra*, pp. 10a, 7a; italics supplied).[7]

Thus, the Court below unlawfully circumscribed the statutory jurisdiction of the Commission, and in so doing invaded the Commission's province by substituting its own judgment for administrative determination of the Commission.

The foregoing errors are compounded by the fact that, contrary to express prohibition in the statute conferring review jurisdiction upon it, the Court below based its determination solely on its own objection, raised *sua sponte*, to the Commission's order under review. It conceived of the question before it as one whether the Commission has statutory jurisdiction to consider a certificate application conditioned to limit the scope of the Commission's inquiry, the Court asserting, contrary to the record facts, that the applications were so conditioned. Manifestly, the Court below violated restrictions on its statutory jurisdiction in considering such objection, *sua sponte*.

The decision below is in conflict with applicable decisions of this Court. This request for review presents several publicly important questions of interpretation of the Natural Gas Act calling for delineation by this Court of the statutory jurisdiction of the Commission and the reviewing court, respectively.

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[7] A fair paralleling of the Commission's findings and the Court's opinion irrefutably shows that the Commission did consider deliberately the matter of price and suggests that the Court was dissatisfied—not because of the lack of such consideration—but with the result thereof.

I.

Effect of Decision Below Upon Administration of the Natural Gas Act

Employment of the rationale of the Court below in administration of the Natural Gas Act would result in administrative chaos. The main thrust of the decision below is a judicial drive toward imposition of an administrative policy requiring the Commission to determine the reasonableness of the initial rate whenever a price question is raised in a certificate proceeding.

Preliminarily, it should be pointed out that the Commission has consistently held it administratively unwise and unworkable to convert producer certificate proceedings into rate proceedings, determining the justness and reasonableness of the producer contract rates.[6] Such interpretation of its authority by the Commission must be given considerable weight. *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933); *Signal Oil and Gas Co.* v. *Federal Power Commission*, 238 F.2d 771, 774 (C.A. 3, 1956).

Out of literally thousands of producer applications coming before it, in only one case has the record been such as to lead the Commission to attach a rate reducing condition, this exception being the so-called

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[6] *Re Anthony J. Tamborello*, 14 F.P.C. ——, 11 PUR 3d 413 (1955); *Re Cities Service Gas Company*, 14 F.P.C. ——, 12 PUR 3d 3 (1955); *Re Natural Gas Pipeline Company of America*, 16 F.P.C. 80, 16 PUR 3d 277 (1956); *Re Seaboard Oil Company*, 19 F.P.C. 416, 23 PUR 3d 1 (1958); *Re Hope Natural Gas Company*, 19 F.P.C. 405 (1958); *Re Superior Oil Company*, 19 F.P.C. 637; *Re Sunray Mid-Continent Oil Company*, 19 F.P.C. 618; *Re Texaco Seaboard, Inc.*, 20 F.P.C. ——, Opinion No. 315, issued September 4, 1958.

Signal case.[9] There, the Commission was careful to point out that it was not prescribing the "just and reasonable" rate, stating (15 F.P.C. 1020, 1021):

> "We do not hold that the issue of rates in a certificate proceeding is identical in scope and effect with that in a section 4 and section 5 proceeding. The rate we deem proper to be charged if a certificate should issue is not necessarily the same we could find to be the lowest reasonable rate under Section 5. Criteria for prescribing a rate necessarily differ from criteria for proscribing a rate."

The Commission expressed similar considerations as controlling its decision to issue certificates without determining the "just and reasonable" rate in other producer certificate proceedings. Thus, in the *Tamborello* case, decided the same day when the *Signal* opinion issued, the Commission held on rehearing that [15 F.P.C. 1, 3; (1956)]:

> "Adoption of the contentions of applicants for rehearing would require that prior to issuance of any certificate of public convenience and necessity authorizing the sale of natural gas in interstate commerce for resale we enter upon the equivalent of a complete section 5 investigation and, on the basis of the evidence adduced, determine the 'lowest reasonable rate'. The rate so determined would then be imposed by a condition attached to the certificate. Such holding would not only be contrary to the plain language of the act but would also prevent us from exercising the judgment and discretion delegated to us by Congress. Reasonable regulation of natural gas companies,

[9] *Re Cities Service Gas Company*, 14 F.P.C. ——, 12 PUR 3d 3, reh. den., 15 F.P.C. 1020, aff'd, *sub. nom., Signal Oil and Gas Company* v. *Federal Power Commission*, 238 F. 2d 771 (C.A. 3, 1956), *cert.* den., 353 U.S. 923 (1957).

whether interstate pipeline transmission companies or independent producers, requires that our decisions and determinations be the result of a conscientious appraisal of evidence adduced, having regard for the interest of all who may be affected thereby and our determination of the requirements of public convenience and necessity in the circumstances."

The Commission has been consistent in its refusal to convert certificate proceedings into rate cases. This is exactly the conclusion reached in *Oklahoma Natural Gas Company* v. *Federal Power Commission*, 257 F. 2d 634 (C.A.D.C., 1958); *Florida Economic Advisory Council* v. *Federal Power Commission*, 251 F.2d 643 (C.A.D.C. 1957). Even though the intervenors in *Oklahoma Natural*, unlike the intervenors in our case, did present evidence respecting the impact of the contract price, the Commission declined in its discretion to attach a rate condition. *Re Natural Gas Pipeline Company of America*, 16 F.P.C. 80, 91-92 (1956).

Referring to the decision in *Oklahoma Natural*, the Court below stated here (*infra*, p. 7a):

> "While the Commission probably should always consider the impact of the proposed initial rate in its determination of public convenience and necessity, we do not reach the question of whether the Commission must fix the initial rate when its inquiry demonstrates that there is a substantial question of the reasonableness of that initial rate. See *Oklahoma Natural Gas Co.* v. *Federal Power Commission*, and the dissenting opinion of Judge Bazelon, D. C. Cir., 257 F. 2d 634, 642."

In short, the Court below asserts that it does not reach the question whether, because of the force of Section

4(a) of the Act,[10] the Commission must in *every* certificate case determine whether the initial rate is "just and reasonable." But it significantly states that "the Commission probably should always consider the impact of the proposed initial rate" at the time of certification. Immediately thereafter, the Court below proceeds to state its view that, in the instant case, the Commission has left no doubt of the "importance and *necessity* of a consideration of the *reasonableness*,[11] of the proposed initial rate" (italics and footnote supplied; *infra*, p. 7a).

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[10] Section 4(a) provides [52 Stat. 822 (1938); 15 U.S.C. 717(c) (1952)]; "All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful."

[11] To the same effect is another error in the statement of the Court below that (*infra*, p. 7a):

> "When the Signal Oil case was before the Commission, it said that the *justness and reasonableness* of the rate was a 'vital element' in demonstrating 'that the service proposed is or will be required by the present or future public convenience and necessity.'" *Cities Service Gas Co., et al*, 12 P.U.R. 3d 3, 14 (1955)" (italics supplied).

The Commission said no such thing. It dealt with the certificate standard, not the rate standard. The exact language in *Signal* used by the Commission, which was paraphrased by the Court in the above question, is (12 PUR 3d 3, 14):

> "In this, a proceeding upon a certificate application, Signal as applicant-seller has the burden of proving all elements of its application so that we may conclude that the service proposed is or will be required by the present or future public

Moreover, it should be noted that, in the experience of more than four years of regulation, the Commission has not yet approved any criteria for determining just and reasonable rates for producers. Commonly, several years are currently being required for the processing of a rate case through the Commission's administrative machinery. Producer certificate proceedings, we submit, cannot wait that long. Obligations to leasehold interests and simple economic necessity preclude such prolongation. The need of consumers for new gas supplies also requires more expeditious certification.

In short, public interest forbids turning certificate proceedings into rate proceedings, a night-follows-day sequel to the decision below.[12]

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convenience and necessity. A vital element of such proof is concerned with the rates proposed."

Indeed, the Commission expressly stated that it was not determining the "justness and reasonableness" of rates in *Signal* (12 PUR 3d 3, 14):

> "[We] do *not* purport to determine the *just and reasonable* rate within the meaning of § 4 (italics supplied).

Additionally, the Commission noted in *Signal* (12 PUR 3d 3, 16-17):

> "A proceeding [under Section 7(c) of the Act] cannot and is not intended to take the place of a proceeding under §§ 4 or 5 of the act."

[12] In a recent demonstration why it is neither necessary nor desirable to convert every certificate proceeding into a rate proceeding, the Commission said that this would result in bringing "to a virtual halt the granting of certificate applications both to independent producers and pipelines whose applications are dependent on the certification of such sales." *Re Transcontinental Gas Pipe Line Corporation, et al.*, Docket Nos. G-13143, *et al.*, Order Denying Applications for Rehearing, mimeo ed. p. 4, issued Oct. 31, 1958.

II.

The Court Below Erroneously Restricted the Statutory Jurisdiction of the Commission.

The one clear holding below is that the Commission was ousted from its statutory jurisdiction to consider an application where the applicants indicated an unwillingness to accept certificates with a condition reducing the contract price. The Court said (*infra*, pp. 10a-11a):

> "Congress has not given the Commission power to inquire into the issue of public convenience and necessity where, as here, the applicant circumscribes the scope of that inquiry by attaching a condition to its application requiring the Commission to forego the consideration of an element which may be necessary in the formulation of its judgment.
>
> * * * * *
>
> "The action of the applicants in curtailing the decision-making power of the Commission demonstrates their unwillingness to conform to the provisions of the Act; this in itself would require the denial of the applications."

These conclusions seemingly stem from the fact that Petitioners indicated to Tennessee their unwillingness to accept certificates, issued by the May 20 order, conditioned to require a reduction in the contract price from 21.4¢ to 17¢. The Court concluded that this deprived the Commission of jurisdiction to consider further the applications of Petitioners.

Basic to its decision is an apparent misconception by the Court that Section 7 of the Act requires an applicant to agree in advance to accept any certificate which might be issued to it. The fact that the Petitioners did

not accept the conditional certificates was interpreted by the Court as a "threat"[13] which circumscribed the Commission's inquiry by "attaching a condition" to the applications, thus somehow limiting the Commission's "statutory jurisdiction."

Let it first be made clear that, wholly contrary to the statement in the decision below, there was no condition attached to any of the applications. Nor can it be said that the request of Petitioners for certificates conforming to their contracts implied a "condition" to the applications "requiring the Commission to forego the consideration of an element which may be necessary in the formulation of its judgment." For such a request does no more than present the nature of the *proposal* of applicants to be weighed by the Commission against the totality of the requirements of the public convenience and necessity.

Even if this were not so, the Court plainly erred in supposing that a conditional application could "limit" the statutory jurisdiction of the Commission. It held that "the Commission has not been endowed by Congress with jurisdiction to conduct a *limited* inquiry". (Court's italics; *infra*, p. 11a). But a request for a

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[13] The 'threat' characterization is four times employed by the Court below (*infra*, pp. 5a, 8a, 8a note 6, 10a). Each time, it used the term to describe the undeniable right of Petitioners to commit, or decline to commit, their reserves to interstate service under a certificated sale. For example, the Court said (*infra*, p. 8a):

> "It was only after the threat of withholding the gas from the interstate market that the Commission retreated from its previous position and granted the certificates without rate condition by its order of June 24, 1957."

certificate without a rate reducing condition in no sense limits the Commission's inquiry into the price aspects of such a proposal, along with all other elements entering into the complex of public convenience and necessity. And that is exactly the process delineated by the Commission in its order under review from which it drew its ultimate conclusion (*infra*, p. 15a):

> "We are of the opinion that, in the circumstances of this case, in view of the great demand for gas by customers of Tennessee Gas, the price consideration should not be made the prime determinant of what the public convenience and necessity require."

Petitioners' request for certificates conforming as to price with the proposals in their applications are not unlike, in principle, a request for certificate authorization for a period limited to agree with the term of the basic sales contract. A Commission holding that it lacked jurisdiction to grant a certificate so limited was reversed on review in *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 239 F. 2d 97 (C.A. 10, 1956). When this Court reversed on other grounds, it noted that the Commission, in the Supreme Court, agreed with the Court of Appeals that it did have jurisdiction to issue a certificate of limited duration. 353 U.S. 944 (1957). Obviously, the Commission has jurisdiction to consider an application for a limited certificate, just as it has jurisdiction to consider an application for a certificate without a rate reducing condition.

The view of the Court below that Section 7 required an applicant to agree in advance to accept any certificate which might be issued to it necessarily proceeds on a premise that a certificate applicant cannot request

the issuance to it of a certificate in accordance with its proposal without depriving the Commission of jurisdiction to consider its proposal. In other words, as viewed by the Court, the Act requires an applicant to commit itself to accept any certificate issued, no matter how conditioned or how much at variance with the sale it proposes. This fallacy carries through to the conclusion of the opinion of the Court below where this remarkable deduction is set forth (*infra*, p. 11a):

> "The action of the applicants in curtailing the decision-making power of the Commission demonstrates their unwillingness to conform to the provisions of this Act; this in itself would require denial of the applications."

An applicant has no obligation—under statute, regulation, or otherwise—to accept a certificate containing a condition which the applicant deems unreasonable or otherwise unacceptable. An applicant's right to reject a proffered certificate is a freedom provided under the statutory scheme as an equitable concomitant for the conditioning power vested in the Commission by Section 7(e) of the Act. In practice, every producer-applicant requests a certificate exactly as set forth in his application. In this case, Petitioners sought certificate authorization merely to make the sales as provided for in their contracts. This harmonizes with the function of privately negotiated contracts in the scheme of regulation under the Act. *Cf., United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, 350 U.S. 332 (1956). In light of *Mobile*,[14] how could it be

[14] In *Mobile*, this Court recognized that the contract between the parties is the foundation block upon which rests the Commission's rate-reviewing powers, saying (350 U.S. at 341):

> "Recognizing the need these circumstances create for individualized arrangements between natural gas companies and

said that Petitioners' request for their contract price as the initial rate deprives the Commission of jurisdiction to consider their applications and affix such reasonable conditions as it might consider to be in the public interest?

Moreover, an applicant's right to accept or reject a certificate is expressly contemplated by the Commission's certificate regulations.[15]

Similarly, in accordance with usual practice in administration of the Act, the order here under review provided expressly for "acceptance", an act of surplusage if an applicant were powerless to reject (*infra*, p. 19a). If the Court below were right in supposing an

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distributors, the Natural Gas Act permits the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public.

* * * * * *

"Moreover, the very premise that §§ 4(d) and (e) and 5(a) are alternative rate-changing 'procedures' is itself based on a misconception of the structure of the Act. These sections are simply parts of a single statutory scheme under which all rates are established initially by the natural gas companies, by contract or otherwise, and all rates are subject to being modified by the Commission upon a finding that they are unlawful. *The Act merely defines the review powers of the Commission and imposes such duties on natural gas companies as are necessary to effectuate those powers; it purports neither to grant nor to define the initial rate-setting powers of natural gas companies*" (italics supplied).

Since privately negotiated contracts form the basis for the Commission's rate authority, it is at least anomalous that the Court below should attach the labels of "threat" and "unwilling sellers" to Petitioners' request for certificates in accordance with the terms of their contracts.

[15] 18 CFR 157.20.

applicant unable to reject a certificate, the Commission could have compelled acceptance of the May 20 order reducing the initial rate to 17¢. Contrary to any such supposition, however, that order also expressly provided for "acceptance" (J. Pet. for Rev., No. 12,403, Ex. F, p. 71).

Any implication that a certificate applicant must agree in advance to accept whatever certificate the Commission might issue, regardless of the conditions attached, is contrary to the underlying philosophy of the Natural Gas Act. *Cf., Central West Utility Company* v. *Federal Power Commission,* 247 F. 2d 306 (C.A. 3, 1956). The detrimental effect of such a rule is manifest. No seller would willingly commit his reserves to the interstate market if forced to proceed on such a "grab-bag" basis. The inevitable results will operate adversely to the ultimate consumers through curtailment of supplies available for the interstate market.

The established governing principle was recently expressed as follows by one of the Commission's Presiding Examiners:[16]

> "The filing of an application for a certificate does not of itself create a legal obligation to accept such a certificate tendered by the Commission. Neither can such filing create a moral obligation if the applicant is asked to accept a certificate which varies in the slightest from the form of certificate sought by the applicant."

The holding that Petitioners' request for certificates conforming to their contracts divested the Commis-

[16] *Re Sunray Mid-Continent Oil Company,* Docket Nos. G-4916, *et al.,* Decision issued October 21, 1958.

sion of its statutory jurisdiction to consider their applications eats away at the foundation of the regulatory scheme provided by Congress as interpreted in *Mobile*. It proceeds on a manifest fallacy that an applicant irretrievably commits himself to accept whatever certificate issues. The consequences flowing from this error will be far reaching and should be avoided through review by this Court.

III.

The Court Invaded the Administrative Province of the Commission

The freedom of an applicant to accept or reject any certificate offered certainly does not and cannot foreclose consideration by the Commission of any issue it deems essential in reaching its public convenience and necessity determination. It is affirmatively clear that the Commission was not so restricted here, for it expressly weighed the element of price, saying (*infra*, p. 15a):

> "In the present status of the case we are left with the difficult problem of how to assure the delivery of gas to the large market served by Tennessee Gas, and at the same time protect the consumers from an unreasonably high price. *In reaching a solution to this problem we are moved by the primary consideration that the public served through the Tennessee Gas system is greatly in need of increased supplies of natural gas. Further, it appears to us, important as is the issue of price, that as far as the public is concerned, the precise charge that is made initially is less important than the assurance of this great supply of gas.* In view of these circumstances and the fact that the record does not show that the 21.4-cent rate is necessarily excessive, we agree with the presiding ex-

aminer that this certificate proceeding under Section 7 of the Natural Gas Act should not assume the character of a rate proceeding under Section 5(a). *We are of the opinion that, in the circumstances of this case, in view of the great demand for gas by customers of Tennessee Gas, the price consideration should not be made the prime determinant of what the public convenience and necessity require.* By virtue of the authority conferred upon us by Sections 4 and 5 of the Natural Gas Act and the proposal to modify the contracts made by the CATCO companies, we are of the opinion that we will be able to adequately protect the public interest with respect to the matter of price. In order, therefore, to insure that deliveries of gas by the four CATCO companies to Tennessee Gas will commence as promptly as possible, we will grant permanent certificates to them by this order without any condition affecting the initial price of 21.4 cents per Mcf" (italics supplied).

Disregarding entirely these findings in the only order under review, the Court below would drive the Commission to a determination of the "reasonableness" of the initial rate, as we have already shown (*supra*, pp. 11-15).

In so doing, the Court quoted extensively from earlier orders not under review, orders abandoned by the Commission in its administrative determination of the public convenience and necessity requirements (*infra*, pp. 3a-5a).

Reversal of the Commission's order for an asserted failure to consider the matter of price in the face of the explicit findings therein constitutes a manifest substitution of judicial judgment for the administrative judgment of the Commission. For it is obvious that

what the Commission did was to consider the matter of price along with other factors. Exercising its discretion, the Commission concluded that the public interest would be served by encouraging dedication of the large gas reserves involved to the interstate market, and merely postponing its determination whether the contract rate was just and reasonable. The Commission was supported in this conclusion by the recognized fact that there was no indication that the contract rate was excessive (*infra*, p. 15a). And it was, in any event, confronted with the sort of record usual to a certificate proceeding in that there was a total absence of evidence upon which to determine the "just and reasonable" rate, since the opposing intervenors offered no evidence in support of their rate contentions.

On the basis of the record, the Commission, exercising its discretionary power, decided not to attach rate reducing conditions to the certificates. This final determination was predicated upon the complex of elements comprising the public convenience and necessity.[17] Plainly, in refusing to recognize the explicit findings of the Commission and substituting its judgment for that of the Commission, the Court below erred. *Gray* v. *Powell*, 314 U.S. 402 (1941); *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515 (1946). Correlatively, since the Act provides alternative methods of regulation—a reasonable rate condition under Section 7 where supported by the record, or a rate proceeding under Section 5—responsibility for

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[17] Undoubtedly, the reviewing court must address itself to the order under review, for it is immaterial that the Commission may have reached a different conclusion upon the same record in an earlier order. *Cia Mexicana de Gas* v. *Federal Power Commission*, 167 F. 2d 804, 806-807 (C.A. 5, 1948).

selecting the means of achieving the statutory policy and the relation of remedy to policy are matters peculiarly with the Commission's discretion. *American Power & Light Company* v. *Securities and Exchange Commission*, 329 U.S. 90, 112 (1946); *Phelps Dodge Corporation* v. *National Labor Relations Board*, 313 U.S. 177, 194 (1941); *cf.*, *Federal Power Commission* v. *Idaho Power Company*, 344 U.S. 17, 21 (1952).

The Court below usurped the administrative discretion reserved by Congress to the Commission. In so doing, it violated its own accurate statement of the governing fundamental requirements (*infra*, p. 10a):

> "The Act entrusts to the Commission, and to the Commission alone, the power and authority to determine the issue of public convenience and necessity. Within the framework of the Natural Gas Act, the Commission alone is entrusted with determining the scope of its inquiry necessary to arrive at the decision of whether to certificate a specific sale."

IV.

The Court Exceeded Its Statutory Authority in Basing Its Determination on an Objection Raised Sua Sponte

It is clear that the Court below exceeded its statutory authority, when it departed from the objections urged by the parties and based its determination on an objection to the Commission's order, raised *sua sponte*. For it is settled law that statutory review provisions, such as those in Section 19 of the Natural Gas Act,[18] contain "a distinctive formulation of the conditions under which resort to the courts may be made and Congress determines the scope of jurisdiction of the

[18] 52 Stat. 831 (1938); 15 U.S.C. § 717r.

lower federal courts." *Federal Power Commission* v. *Pacific Power & Light Company*, 307 U.S. 156, 159 (1939).

Section 19 (b) is explicit in limiting the jurisdiction of a court of appeals to review commission orders. One such express limitation is:

> "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do."

In their applications for rehearing, opposing intervenors before the Commission urged a number of objections, largely dealing with claims that the Commission abused its discretion in declining to attach to the certificates a condition reducing rates (J.A. 447a-474a). None even suggested that the Commission lacked "statutory jurisdiction" in any respect to entertain or act upon the certificate applications before it. Nor did they advance any such claim in their petitions seeking review by the Court below. Ignoring entirely the objections which had been urged before the Commission, the Court below conceived of the sole issue before it as one dealing with the "statutory jurisdiction" of the Commission "to consider an application for a certificate under Section 7(e) where the terms of the application limit the scope of the inquiry which the Commission is required to make for a determination of public convenience and necessity." But its conclusion that the Commission lacks such "statutory jurisdiction" constitutes an objection to the Commission's order which had not theretofore been urged before the Commission in an application for rehearing. This directly contravenes the plain terms of the limit-

ing provisions of the Act of Congress determining the scope of the jurisdiction of the court below. Section 19(b).

The courts have rigorously applied the limitations in Section 19(b). Thus, a reviewing court is powerless to resolve a case before it on objections raised *sua sponte*, even if it were to apply correct principles in disposing of those objections. *Federal Power Commission* v. *Colorado Interstate Gas Company*, 348 U.S. 492 (1955); *cf.*, *City of Pittsburgh* v. *Federal Power Commission*, 237 F. 2d 741, 749 (C.A.D.C., 1956); *Magnolia Petroleum Company* v. *Federal Power Commission*, 236 F. 2d 785, 789 (C.A. 5, 1956); *Memphis Light, Gas and Water Division* v. *Federal Power Commission*, 243 F. 2d 628, 632 (C.A.D.C., 1957).

In *Colorado Interstate*, this Court left no doubt that the foregoing limitation in Section 19(b) is to be strictly enforced. Reversing the court of appeals which had considered, *sua sponte*, an objection which had not been urged before the Commission, this Court held (348 U.S. at 498-499):

> "Respondent's second and principal contention is that although its application did not meet the requirements of § 19(b) and *it* therefore is barred from attacking the validity of the merger conditions in the Court of Appeals, nothing precludes that court itself from raising, considering and sustaining the same objection, *sua sponte*. Respondent's error appears on the face of the statute. Section 19(a) first precludes the *bringing* of any proceeding in a Court of Appeals to review an order of the Commission, *unless the person bringing it previously has applied to the Commission for a re-hearing on that order*. Section 19(b) then expressly precludes the *consideration* by the court

> of any objection to an order of the Commission, *unless the objection shall have been urged before the Commission in the application for rehearing.* As the court is thus expressly *precluded from considering* an objection when, without prior application to the Commission, that objection is presented to the court by the party directly aggrieved, it cannot be assumed that Congress intended to *permit* the same court to consider the same objection, under the same circumstances, *sua sponte,* merely because the objection was *not* presented to the court by the party aggrieved. Section 19(b) reflects the policy that a party must exhaust its administrative remedies before seeking judicial review. To allow a Court of Appeals to intervene here on its own motion would seriously undermine the purpose of the explicit requirements of § 19(b) that objections must first come before the Commission" (Court's italics).

Similarly, in *Panhandle Eastern Pipe Line Company* v. *Federal Power Commission,* 324 U.S. 635, 649-651 (1945), this Court held that the company's failure in its application for rehearing to question the Commission's jurisdiction to include producing properties in its rate base precluded the reviewing court's consideration of that question.

Strikingly in point is the decision in *American Power and Light Company* v. *Securities and Exchange Commission,* 141 F. 2d 606 (C.A. 1, 1944), aff'd., 329 U.S. 90 (1946), where the Securities and Exchange Commission, pursuant to Section 11(b)(2) of the Public Utility Holding Company Act,[19] had issued orders requiring dissolution of two subsidiaries of Electric Bond & Share Company. Review was sought pursu-

[19] Section 11(b)(2) of the Act of August 26, 1935, 49 Stat. 820, 15 U.S.C. § 79k(b)(2).

ant to Section 24(a) of the Public Utility Holding Company Act,[20] which is substantially identical with Section 19(b) of the Natural Gas Act, providing that:

> "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission. * * *."

In their brief before the court, petitioners there sought to raise for the first time a question whether Section 11(b)(2), as a matter of statutory interpretation, authorizes the dissolution of subholding companies as one method of bringing a holding company system into compliance. The court held that it had no power to review the question, stating (141 F. 2d at 613):

> "[T]here can be no doubt that under § 24(a) petitioners were obliged to raise before the Commission issues as to *the Commission's statutory authority* to issue the contemplated orders" (italics supplied).

Compare the decision below. Passing objections raised by Petitioners, the Court turned to its own objection dealing with "the Commission's statutory authority" to grant the applications and decided the cases solely on that issue.

Clearly, the Court below exceeded its own jurisdiction under the Act in basing its determination upon an objection not urged before and not primarily considered by the Commission, and not urged before the Court.

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[20] Section 24(a) of the Act of August 26, 1935, 49 Stat. 834, as amended, 15 U.S.C. 79x.

V.

Conclusion

For all of the foregoing reasons, it is urged that this petition for a writ of *certiorari* be granted.

Respectfully submitted,

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